UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 90-9-P-C***
	)	***(Civil No. 97-153-P-C)***
RODNEY MAXIM,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Rodney Maxim moves this court to correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 21 months imprisonment was imposed upon a judgment that Maxim had violated five conditions of his term of supervised release following imprisonment for a term of 40 months upon his conviction on a guilty plea to two counts of conspiracy to distribute, and to possess with intent to distribute, cocaine, in violation of 21 U.S.C. §§ 841 and 846. Maxim, appearing *pro se*, contends that he received ineffective assistance of counsel during the revocation proceeding and specifically seeks a reduction of three months in his sentence.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that the allegations are contradicted by the record and that even if true the allegations would not entitle Maxim to relief. Accordingly, I recommend that the motion be denied

without an evidentiary hearing.

I. Background

On February 12, 1990 Maxim entered a plea of guilty to an information charging two counts of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 841 and 846. Information (Docket No. 2); Docket Sheet. In determining sentence, the court found that Maxim's criminal history category under the United States Sentencing Commission Guidelines ("U.S.S.G.") was Category II, and that the applicable guideline range was 87 to 108 months. Memorandum of Sentencing Judgment (Docket No. 4) at 2. The government moved for downward departure, *id*. at 4, and the court sentenced Maxim to a term of imprisonment of 60 months, *id*. at 5. At the sentencing hearing, after stating that "I recognize some overstatement in the criminal history category," Transcript of Proceedings (June 6, 1990) at 20, the court affirmed that Maxim's criminal history category under the guidelines was II, *id*. at 34. The court then observed that, given the government's request for downward departure, the sentence to be imposed "should be taken from the guideline that would exist if there were a criminal history category of 1 here." *Id*. at 35. Maxim was sentenced to a term of imprisonment of 60 months to be followed by four years' supervised release. Judgment (Docket No. 5) at 5.

Maxim's sentence was reduced on July 18, 1991 to 40 months. Amended Judgment (Docket No. 8). On October 17, 1996 the government filed a petition for revocation of Maxim's supervised release. Docket No. 14. Maxim admitted the violations of the terms of his supervised release as charged by the government. Transcript of Proceedings, revocation hearing and sentencing (Nov. 8, 1996) ("Revocation Tr.") at 12-13. In imposing sentence, the court determined that the criminal

history category applicable at the time of the original sentencing was category II, which resulted in a guideline range of 15 to 21 months. *Id*. at 30. The court imposed a sentence of 21 months. *Id*. at 33.

II. Analysis

As the basis for his claim of ineffective assistance of counsel during the revocation of his supervised release and the sentencing proceeding that resulted, Maxim asserts that his counsel "failed to argue and show that at the time of the previous sentence the defendant was sentenced in criminal history category 1" and that he "failed to produce to defendant a pre-sentence report to defendant for a reasonable time to review and object to issues." Motion (Docket No. 20) at 5.

Strickland v. Washington, 466 U.S. 668 (1984), provides the applicable standard for assessing whether a defendant has received ineffective assistance of counsel such that his Sixth Amendment right to counsel has been violated. The defendant must show that counsel's performance was deficient, i.e., that the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Second, the defendant must make a showing of prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The court need not consider the two elements in any particular order; failure to establish either element means that the defendant is not entitled to relief. *Id*. at 697.

It is not necessary to apply the *Strickland* test to the first ground asserted by Maxim. The transcript of the revocation proceeding shows that his counsel at that time did in fact argue for application of a criminal history category of I. Revocation Tr. at 23-24. The court imposed sentence

based on a criminal history category of II, in accordance with U.S.S.G. § 7B1.4. In addition, my own careful review of the transcript of the initial sentencing, as well as the memorandum of sentencing judgment issued by the court at that time, indicates that a criminal history category of II was applicable to the initial sentencing. The court's reference to category I was only an explanation of part of its rationale for the downward departure it approved in response to the government's motion. Maxim therefore is not entitled to relief on the basis of the first ground asserted in his motion.

Maxim's second asserted ground is also belied by the record. He confirmed at the revocation hearing that the revocation report was read to him in its entirety by his counsel that morning. Revocation Tr. at 13-14. It was not prepared until the day before the hearing. *Id*. at 13. Maxim stated that he fully understood the contents of the report, and that he objected only to details concerning his compliance with the urinalysis requirements of the supervised release. *Id.* at 14-15. He continued to admit to the violations listed in the report. *Id.* at 15, 17. There is no reason why the presumption of truthfulness that attaches to a defendant's statements at a Rule 11 hearing on a guilty plea, *United States v. Butt*, 731 F.2d 75, 80 (1st Cir. 1984) (defendant must present at time of section 2255 motion credible, valid reasons why departure from his earlier contradictory statements is now justified), should not also attach to his statements at sentencing after revocation of supervised release. Maxim suggests no basis for a finding that his earlier statements to the court concerning the revocation report were not truthful, and I can discern none.

In addition, even now, Maxim does not point to any errors in the report or otherwise specify how additional time in which to review the report would have resulted in a different outcome. *See Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985). He has therefore failed to demonstrate prejudice resulting from any error of his counsel that may have occurred.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 8th day of October, 1997.

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David M. Cohen
United States Magistrate Judge